

# SOURCES OF INTERNATIONAL CRIMINAL LAW



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addressee: **individual**, not a state

(to compare: traditional model of PIL is based on the rules of so-called state responsibility)

INDIVIDUAL	STATE
CRIME UNDER IL	VIOLATION OF IL
SANCTIONS OF PUNITIVE AND PREVENTIVE NATURE	RESTORE A SITUATION THAT CONFORMS WITH IL

## Article 38 Statute of the International Court of Justice

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

## I. international treaties

## II. customary international law

- actual state practice (consuetudo, usus)
- sense of legal obligation (opinio juris)



## III. general principles of (international criminal) law

## IV. resolutions of international bodies

## V. subsidiary means for determining the law

- decisions of international courts
- legal scholarship
- resolutions of international organs
- International Law Commission's drafts and comments
- drafts and comments of international scholarly associations
- decisions of national courts
- national legislation
- military manuals

- Until the ICC Statute entered into force – international treaties were of lesser importance for ICI
- Today, **the ICC Statute**, is a main source of ICL
- e.g.:
  - Rome Statute of International Criminal Court (1998)
  - Geneva Conventions (1949) with Additional Protocols I and II (1977)
  - Genocide Convention (1948)
  - Convention against Torture (1984)
  - etc.



## Classical definition:

Customary international law exist if actual practice (*consuetudo, usus*) can be found, based on a sense of legal obligation (*opinio juris*)



I. **Practice** (*consuetudo, usus*) – determined from the totality of states' official behaviours

- Legislative measures
- Decision of courts
- Acts and declarations made by state representatives



practice must be uniform, widespread and *long-term*

II. **Legal obligation** (*opinio juris*)

in many cases this two components became fluid -the same conduct may be considered as an indication of both practice and coresponding *opinio juris*

## Legal principles recognized by the world's major legal systems

**but:** not every law found in several or all legal systems is automatically a general principle of law (and component of international legal order)

### **dual conditions:**

- the law represents a legal principle
- it can be transferable to the international legal order





*„Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subjecte to the following conditions:*

- i. ... international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world [not only common-law or civil law States)...;*
- ii. ... account must be taken of the specificity of international criminal proceedings when utilising national law notions.*

*In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided”*

**-the Yugoslavia Tribunal**

## Part III General principles of criminal law of the ICC's Statute

- Art. 22 *Nullum crimen sine lege*
- Art. 23 *Nulla poena sine lege*
- Art. 24 Non-retroactivity *ratione personae*
- Art. 25 Individual criminal responsibility
- Art. 26 Exclusion of jurisdiction over persons under eighteen
- Art. 27 Irrelevance of official capacity
- Art. 28 Responsibility of commanders and other superiors
- Art. 29 Non-applicability of statute of limitations
- Art. 30 Mental element
- Art. 31 Grounds for excluding criminal responsibility
- Art. 32 Mistake of fact or mistake of law
- Art. 33 Superior orders and prescription of law



# RESOLUTIONS OF INTERNATIONAL BODIES

## RULES OF PROCEDURE AND EVIDENCE

- **supplement and clarify the rules of procedure contained in the ICC Statute itself**
- **are binding on the Court and all state parties**
- **if the provisions of the Rules of Procedure and Evidence contradict the Statute, the ICC Statute takes precedence**



- I. decisions of international courts
- II. legal scholarship
- III. resolutions of international organs
- IV. International Law Commission's drafts and comments
- V. drafts and comments of international scholarly associations
- VI. decisions of national courts
- VII. national legislation
- VIII. military manuals



*e.g. decisions of:*

- *the International Military Tribunal at Nuremberg,*
- *the International Military Tribunal for the Far East,*
- *the Yugoslavia Tribunal*
- *The Rwanda Tribunal*



**The extent to which courts are bound by their own decisions varies:**

- **ICC** can base its decisions on „*principles and rules of law as interpreted in its previous decisions*”, but it is not required to do so
- **Yugoslavia, Rwanda Tribunals** – bound more strongly by precedent

**„teachings of the most highly qualified publicists”**

may be obtained mainly from the reports and statements of international law associations (such as *the Institut du Droit International* and *International Law Association*) and the United Nations International Law Commission



**express the opinio juris of the participating states and thus contribute to the emergence and confirmation of customary international law**

*(e.g. Resolution 95 of 11 December 1946 in which the UN General Assembly affirmed the Nuremberg Principles)*

- **ICTY and ICTR Statutes** adopted by the UN Security Council
- **Rapports of the UN Secretary General** connected with the creation of the *ad hoc* Tribunals are to be considered authentic interpretations in applying their Statutes, as long as they do not contradict the Statutes' provisions





**the reports and drafts are aids in determining customary international law and general principles of law – have significant influence on the development of international criminal law**

*e.g. 1996 Draft Code of Crimes against the Peace and Security of Mankind*

*„an authoritative international instrument which, depending upon the specific question at issue, may*

- i. constitute evidence of customary law, or*
- ii. shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very last,*
- iii. be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world”*

**-the Yugoslavia Tribunal**

works of private scholarly associations such as:

- The Association International de Droit Pénal
- The International Law Association
- The Institut de Droit International



**double nature** of the function of national courts in determining ICL:

- as expression of *opinio juris* and as state practice, they may **confirm or create customary law** and **contribute to the formation of general principles of law**
- decisions of national courts can serve as **aids in recognizing law, helping to determine the content of norms of ICL**

**very important for ICL** : rare criminal trials by national courts that explicitly refer to international criminal law (e.g. *Eichmann Case*)

can also influence ICL as expression of *opinio juris* as well as state practice

e.g.: in the form of an adoption of international penal norms as part of national law

(German Code of Crimes against International Law – *Völkerstrafgesetzbuch*)



→ *opinio juris*

→ state practice



